(2) 83-1758

NO._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1983

KENNETH M. LEVENSALER
Petitioner

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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22 pp

QUESTIONS PRESENTED

1. Where the Bankruptcy Court found critical facts to have been proved by a fair preponderance of the evidence, which the Court discussed in detail, did the District Court on appeal and the Court of Appeals err in concluding that such evidence was clear and convincing?

2. In an action to revoke a discharge in bankruptcy, in which the plaintiffs' Complaint invoked §15 of the Bankruptcy Act (11 U.S.C.A. §33) and alleged various relevant facts, did the trial court and both appellate courts below err in concluding that the Complaint was not defective for want of separate allegations about each requirement of §15?

3. In an action to revoke a discharge in bankruptcy, did Court of Appeals and District Court on appeal

from Bankruptcy Court err in upholding Bankruptcy Court determinations -- essentially factual ones -- that plaintiff lacked sufficient knowledge of bankrupt's fraud at time of discharge, and that plaintiff had not slept on its rights?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

STATEMENT OF THE CASE..... 3

REASONS FOR OPPOSING GRANT OF THE WRIT..... 7

CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases: Page

Allen v. Trust Co. of Georgia, 326 U.S. 630, 66 S. Ct. 389, 90 L.Ed. 367 (1945)..... 11

In re Cuthbertson, 202 F.266, (D.C.S.D., 1912)..... 14

In re Leach, 197 F. Supp. 513 (W.D. Arkansas, 1961)..... 14

McCaughn, Collector of Internal Revenue v. Real Estate Land Title & Trust Co., et al, 297 U.S. 606, 802 L.Ed. 897, 56 S. Ct. 604 (1935)..... 11

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To the Honorable, the Chief Justice and

Associate Justices of the Supreme Court

of the United States:

Hartford Accident and Indemnity Company, the Respondent herein, respectfully requests that a Writ of Certiorari not issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 1, 1984.

STATEMENT OF THE CASE

During 1975 and for several years prior thereto, Kenneth Levensaler ("Levensaler") was president and sole stockholder of Johnson Electrical Company, Inc. ("Johnson"), an electrical contracting firm. Beginning in 1975, Johnson encountered serious financial problems. Many of its suppliers were refusing to extend credit, and its major financing source, The Connecticut Bank and Trust Company ("CBT"), demanded payment on a debt of more than $1,000,000. Johnson ceased work on its then current projects and discharged most of its employees.

Those difficulties led to the filing on September 22, 1975, of an involuntary petition in bankruptcy by three of Johnson's creditors, among them Hartford Accident and Indemnity

Company ("Hartford") the Respondent herein. On September 25, 1975 Johnson itself filed a petition seeking an arrangement under Chapter XI of the Bankruptcy Act. On October 20, 1975, however, Johnson consented to be adjudicated a bankrupt, and administration of its affairs since then has proceeded as a Chapter VII liquidation.

Hartford had furnished combination performance and payment bonds on behalf of Johnson for a number of its electrical subcontracts on various construction projects in Connecticut and Rhode Island. Hartford suffered substantial losses on those bonds when Johnson ceased business in August 1975 and defaulted on its contract.

Levensaler had personally indemnified Hartford against any and all losses it might incur on the bonds it

had written on behalf of Johnson. Accordingly, when Johnson failed to perform, Levensaler became liable on his personal indemnity to Hartford. He was similarly liable on many other Johnson obligations. On April 30, 1976, Levensaler filed a petition in bankruptcy under Chapter VII. Hartford, as Levensaler's largest single creditor, filed a claim against the bankrupt estate. Levensaler was discharged by the Bankruptcy Court on July 2, 1976. On December 2, 1976, Hartford brought the action that is the subject of this proceeding -- a complaint seeking revocation of Levensaler's discharge. The trial began on December 1, 1978, continued on a court availability basis, and lasted about three-quarters of a year. Following various post-trial proceedings, the Bankruptcy Court on June

10, 1980, issued a Memorandum and Order ("Mem.") in which the court granted Hartford's complaint and revoked Levensaler's discharge. On July 9, 1980, Levensaler appealed to the District Court for the District of Connecticut.

In his appeal to the District Court, Levensaler stated six issues. Hartford prevailed with respect to all of them. The revocation order of the Bankruptcy Court was thus affirmed.

Levensaler appealed to the Court of Appeals for the Second Circuit. In that appeal he raised only three issues - those being the very questions placed before this Court in his Petition for a Writ of Certiorari. Once again, Hartford prevailed with respect to all issues presented. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR OPPOSING GRANT OF THE WRIT

THERE HAVE ALREADY BEEN TWO APPEALS IN THIS CASE, AND BOTH APPELLATE COURTS HAVE RULED THAT NO REVERSIBLE ERROR WAS COMMITTED. THERE IS NO BASIS FOR ISSUANCE OF THE WRIT.

Levensaler's first appeal was from the Bankruptcy Court to the District Court of Connecticut. In that appeal he raised six different issues and did not prevail with respect to any of them. The District Court's conclusion was that the Bankruptcy Court had not erred in ordering a revocation of Levensaler's discharge in bankruptcy on the ground that it had been obtained by fraud. From that ruling Levensaler appealed to the Court of Appeals for the Second Circuit. In that appeal he raised three of the six issues that had earlier been considered by the District

Court. The Court of Appeals ruled against Levensaler on all three.

In this petition Levensaler raises the same three issues that have twice been considered on appeal. There is no basis for reversing the rulings of the Court of Appeals on those issues.

A. The first issue raised by Levensaler pertains to the standard of proof employed by the Bankruptcy Court in determining certain critical factual issues. The trial court held that Hartford had carried its burden of proof on those issues with a fair preponderance of the evidence.

On appeal to the District Court, Levensaler claimed that the Bankruptcy Court had applied the wrong standard of proof -- that it should have required proof by "clear and convincing" evidence. Hartford contended that the requisite

burden of proof could be met by a fair preponderance of the evidence if that evidence were shown to have been clear and convincing. Reference to the Bankruptcy Court's discussions of the evidence made it patently clear that that court had, indeed, found the evidence to be both clear and convincing, albeit the court did not use those terms in juxtaposition with its statement about Hartford having carried its burden with a fair preponderance of the evidence.

The District Court expressed some doubt about whether the "clear and convincing" standard of proof was even applicable in an action for revocation of a discharge, pointing out that preponderance of the evidence was all that was needed to deny a discharge under §14 of the Bankruptcy Act for filing a

false account. The standard for revocation was no higher than the standard for denial of a discharge, the Court said. (Petitioner's Brief, p. 93A). Indicating that the question might be superfluous, the Court nevertheless considered whether evidence about certain loans was clear and convincing. Noting that Levensaler's own account of what had occurred would have sufficed to warrant a revocation, the Court concluded that the trial court had relied on clear and convincing evidence in reaching its conclusion.

The Court of Appeals likewise concluded that evidence relied upon by the trial court had been clear and convincing.

Levensaler now contends that, in thus evaluating the trial court's statements about the evidence, both the

District Court and the Court of Appeals had engaged in a type of weighing of the evidence that is forbidden to appellate courts. In support of his position he cites McCaughn, Collector of Internal Revenue v. Real Estate Land Title & Trust Co., et al, 297 U.S. 606, 802 L.Ed. 897, 56 S. Ct. 604 (1935). In that case the appellate court had reversed the trial court's finding of fact on a review of the evidence.

In the case at bar we do not have the type of problem presented in McCaughn. Here the critical factual issues were resolved against Levensaler at trial, and the findings have twice been sustained on appeal. See Allen v. Trust Co. of Georgia, 326 U.S. 630, 636, 66 S. Ct. 389, 90 L.Ed 367 (1945) for an opinion in which McCaughn was

distinguished on a similar basis.

Levensaler also contends that the District Court on appeal and the Court of Appeals both "impliedly acknowledge" that the "clear and convincing" standard of proof is applicable to proof of fraud in a §15 revocation case. In pressing such a contention, Levensaler infers far more than is warranted by what either of those courts said and did. As stated above, the District Court expressed considerable doubt about whether pursuit of the question about the evidence being clear and convincing was even necessary. Nevertheless, the court found it to be such. The Court of Appeals did not discuss the applicable standard; the court merely stated that, "we are satisfied, as was the district court, that the evidence was sufficient to meet the

clear and convincing standard." (Petitioner's Brief, p. 102A)

B. The second issue raised by Levensaler in his petition for certiorari pertains to a matter of pleading. He contends that Hartford's complaint had not stated with sufficient particularity a cause of action under §15 of the Bankruptcy Act for revocation of a discharge. He makes that contention despite the fact that the question of sufficiency of the pleadings had been considered by each of the three courts below, and all three had failed to find fault with the pleading. Levensaler concedes that rulings on the pleading issue were consistent with a "contemporary view of pleadings in typical cases," and with FRCP 8(a)(1). Nevertheless, he presses for still another consideration of the issue, this time

on the grounds that proceedings for revocation under §15 of the Bankruptcy Act are "unique" and therefore call for a "totally different approach." (Petitioner's Brief, p. 17). He relates what he perceives to be a need for "strict procedure" to a need for finality in bankruptcy proceedings.

In his argument on the pleading issue, Levensaler relies heavily on In re Leach, 197 F. Supp. 513, 520 (W.D. Arkansas, 1961), and a quotation therein from In re Cuthbertson, 202 F. 266 (D.C.S.C., 1912). Unfortunately for his cause, the District Court demonstrated that Levensaler's position was based upon a "drastic misreading" of the case and that it did not even involve an issue of pleading.

The argument based on the need for finality appears to contain the unstated

premise that, to protect the "finality" of discharges in bankruptcy, it is desirable to create barriers, in the form of rigidly technical pleading requirements, against attempts to obtain revocations of such discharges. Such an approach would enshrine form in place of substance.

C. Levensaler's third argument is really a quarrel with the trial court's finding on two factual issues -- whether Hartford had sufficient knowledge of Levensaler's fraud prior to his discharge to have enabled it to object to that discharge, and whether, after Hartford acquired such knowledge, it had slept on its rights.

On both points the trial court found in favor of Hartford. As Levensaler's initial argument in his petition to this Court concedes, this Court

cannot weigh the evidence for the purpose of reversing a trial court's findings of fact.

CONCLUSION

The matters raised by Levensaler's Petition for a Writ of Certiorari have been considered thoroughly by three courts below. The petition states no valid basis for issuance of the Writ, and the petition should be denied.

Respectfully submitted,

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